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7 **UNITED STATES DISTRICT COURT**  
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 JOHN A. GISSLER,

10 Plaintiff,

11 vs.

12 CITIMORTGAGE, INC., et al.,

13 Defendants.

CASE NO. 13-CV-40- IEG (JMA)

**ORDER**

- 14 **1. GRANTING DEFENDANTS'**  
**MOTION TO DISMISS;**  
**2. DENYING DEFENDANTS'**  
**MOTION TO STRIKE**

[Doc. No. 6.]

16 Before the Court are Defendants' motions to dismiss and strike pursuant to  
17 Federal Rules of Civil Procedure 12(b)(6) and 12(f), respectively. [Doc. No. 6.] For  
18 the reasons below, Defendants' motion to dismiss is **GRANTED** and motion to  
19 strike is **DENIED**.

20 **BACKGROUND**

21 This is a mortgage case. Plaintiff John Gissler asserts claims of wrongful  
22 foreclosure, to quiet title, for slander of title, for declaratory relief, and under the  
23 Truth in Lending Act and Fair Debt Collections Practices Act, all premised on a  
24 purportedly wrongful foreclosure. [Doc. No. 1.] Defendant moves to dismiss all  
25 claims and to strike the demand for punitive damages.

26 **DISCUSSION**

27 Even affording every benefit of the doubt, Plaintiff's complaint fails to allege  
28 sufficient facts to support any cognizable legal theory. Thus, to the extent and for

the additional reasons specified below, Defendants’ motion to dismiss is  
**GRANTED.** Defendants’ motion to strike is procedurally improper and thus  
**DENIED.**

#### **I. Motion to Dismiss**

Under Federal Rule of Civil Procedure 8(a)(2), “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). Motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) test the sufficiency of this required showing. *New Mexico State Investment Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011). “Dismissal is proper when the complaint does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory.” *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011).

##### **1. Wrongful Foreclosure**

Plaintiff’s claims premised on California Civil Code sections 2923, [*see* Doc. No. 1 at 19], constitute wrongful foreclosure claims. *See Small v. Mortgage Electronic Registration Systems, Inc.*, 2010 WL 3719314, at \*14 (E.D. Cal. Sept. 16, 2010). Wrongful foreclosure claims require allegations of credible tender. *See Alicia v. G.E. Money Bank*, 2009 WL 2136969, at \*3 (N.D. Cal. July 16, 2009) (“When a debtor is in default of a home mortgage loan, and a foreclosure is either pending or has taken place, the debtor must allege a credible tender of the amount of the secured debt to maintain any cause of action for wrongful foreclosure.”). Plaintiff fails to make any such allegation. [*See* Doc. No. 1.] But amendment could potentially cure this deficiency, and thus Plaintiff’s wrongful foreclosure claims are **DISMISSED WITHOUT PREJUDICE.**

##### **2. Quiet Title Claim**

So too, a “quiet title action is doomed in the absence of Plaintiffs’ tender of the full amount owed.” *Gjurovich v. Cal.*, 2010 WL 4321604, at \*8 (E.D. Cal. Oct.

26, 2010). Because Plaintiff fails to allege tender, *see supra*, his quiet title claim is  
**DISMISSED WITHOUT PREJUDICE.**

### 3. Slander of Title Claim

Slander of title claims require “(1) a publication, (2) which is without privilege or justification, (3) which is false, and (4) which causes direct and immediate pecuniary loss.” *Manhattan Loft, LLC v. Mercury Liquors, Inc.*, 173 Cal.App.4th 1040, 1050 (2009). Plaintiff does not allege that the notice of default at issue was false, much less how such falsity caused direct and immediate pecuniary loss. [See Doc. No. 1.] These deficiencies are fatal, *see Velasco v. Security Nat. Mortg. Co.*, 823 F.Supp.2d 1061, 1069 (D. Hawai’i 2011), but could be cured by amendment, and thus Plaintiff’s slander of title claim is **DISMISSED WITHOUT PREJUDICE.**

### 4. TILA Claims

Plaintiff’s TILA claims for damages are subject to a one-year statute of limitation that may, under certain circumstances, be equitably tolled. *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986). The statute runs from the date the subject loan was consummated. *See King*, 784 F.2d at 915; *see also McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1328 (9th Cir. 2012). Plaintiff’s complaint was filed on January 8, 2013, [see Doc. No. 1], nearly seven years after the subject loan was consummated on September 20, 2006, [see Doc. No. 8-1, Ex. A], and no basis for equitable tolling has been pled. *See Cervantes*, 656 F.3d at 1045 (equitable tolling only available “in situations where, despite all due diligence, the party . . . is unable to obtain vital information bearing on the existence of the claim.”). Thus, Plaintiff’s TILA claims are untimely and barred. *See King*, 784 F.2d at 915. Because amendment could potentially provide a basis for equitable tolling, Plaintiff’s TILA claims are **DISMISSED WITHOUT PREJUDICE.**

### 5. FDCPA

Claims under the FDCPA are only viable against debt collectors. 15 U.S.C. §

1 1692(a)(6). Here, Defendants do not qualify as debt collectors. *See Vieira v.*  
 2 *Prospect Mortg., LLC*, 2012 WL 3356947, at \*5 (C.D. Cal. July 9, 2012)  
 3 (“Originators of loans secured by real property and their assignees . . . are not debt  
 4 collectors, and therefore are not subject to the FDCPA.”). This deficiency cannot be  
 5 cured through amendment, and thus Plaintiff’s FDCPA claims are **DISMISSED**  
 6 **WITH PREJUDICE**.

## 7 6. Declaratory Relief Claim

8 Plaintiff’s claim for declaratory relief is premised on the alleged securitization  
 9 of his mortgage and seeks confirmation that Defendants have authority to foreclose  
 10 notwithstanding the alleged securitization. [Doc. No. 1 at 13-15.] “[A]s a general  
 11 rule, plaintiffs may not bring actions for proof of a defendant’s authority to  
 12 foreclose.” *Vieira*, 2012 WL 3356947, at \*4. “Nor does improper securitization  
 13 excuse a borrower from loan repayment obligations.” *Id.* Rather, even if  
 14 established, “securitization merely creates a separate contract, distinct from [a  
 15 borrower’s] debt obligations under the Note, and does not change the relationship of  
 16 the parties in any way.” *Moseley v. CitiMortgage, Inc.*, 2011 WL 5175598, at \*7  
 17 (W.D. Wash. Oct.31, 2011). As such, the declaration Plaintiff seeks would provide  
 18 no grounds for relief. *Id.* Because Plaintiff’s declaratory relief claim fails to “make  
 19 out a cognizable legal theory,” *see Cervantes*, 656 F.3d at 1041, it is **DISMISSED**  
 20 **WITH PREJUDICE**.

## 21 II. Motion to Strike

22 Defendants move to strike Plaintiff’s request for punitive damages pursuant to  
 23 Fed. R. Civ. P. 12(f). “Rule 12(f) does not authorize district courts to strike claims  
 24 for damages.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir.  
 25 2010). Defendants compound this procedural error by invoking inapplicable  
 26 California pleading standards. [See Doc. No. 6 at 17-18.] “Although in [a] diversity  
 27 action [state] substantive law is to be applied to determine the ultimate validity of the  
 28 plaintiff’s claims, the Federal Rules govern issues concerning the adequacy of the


1 pleadings.” *Clement v. American Greetings Corp.*, 636 F.Supp 1326, 1329 (S.D.  
2 Cal. 1986) (citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and *Hanna v.*  
3 *Plumer*, 380 U.S. 460, 485 (1965)). Defendants’ motion to strike is **DENIED**.

#### 4 **CONCLUSION**

5 For the foregoing reasons, the Court **GRANTS** Defendants’ motion to dismiss  
6 and **DENIES** Defendant’s motion to strike. Plaintiff’s FDCPA and declaratory  
7 relief claims are **DISMISSED WITH PREJUDICE**. Plaintiff’s wrongful  
8 foreclosure, quiet title, slander of title, and TILA claims are **DISMISSED**  
9 **WITHOUT PREJUDICE**. Plaintiff is granted leave to file an amended complaint  
10 no later than July 29, 2013, including only, and curing the defects specified above in  
11 regard to, those claims dismissed without prejudice.

12 **IT IS SO ORDERED.**

13 **DATED:** June 19, 2013

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15 **IRMA E. GONZALEZ**  
16 **United States District Judge**  
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